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ENFORCEMENT OF A RIGHT OF ACTION ACQUIRED UNDER FOREIGN LAW FOR DEATH UPON THE HIGH SEAS.

I.

SHOULD a right of action acquired under foreign law for death upon the high seas be enforced by a court of admiralty of the United States?

The foregoing question came before the District Court of the United States for the Northern District of Illinois in the case of Rundell *v.* La Compagnie Générale Transatlantique;[1] and before the Circuit Court of Appeals for the Seventh Circuit on an appeal taken by the libellant in the same case.[2]

The controversy grew out of the loss of the French steamship La Bourgogne belonging to the defendant company, a French corporation. On July 4, 1898, La Bourgogne collided on the high seas with the British sailing vessel Cromartyshire and was sunk. Edwin R. Rundell, a citizen of Illinois and a passenger on La Bourgogne, was lost in the collision. The administrator of Rundell filed a libel *in personam* in the District Court against the French corporation owning La Bourgogne.

There being no right of action either at common law or by the general maritime law as understood and practiced in the United States for death caused by a wrongful or negligent act,[3] the libel-

[1] 94 Fed. 366 (1899).

[2] 100 Fed. 655 (1900).

[3] Insurance Co. *v.* Brame, 95 U. S. 754; Dennick *v.* Central R. Co., 103 U. S. 11, 21; The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201; Carey *v.* Berkshire R. Co., 1 Cush. (Mass.) 475; Holland *v.* Lynn & Boston R. Co., 144 Mass. 425; Seward *v.* Vera Cruz, 10 App. Cas. 59.

lant alleged in his libel that certain sections of the statute law of France, which were set forth *in hæc verba*, gave a legal representative a right of action for the death of his intestate accruing through the negligence of another; and that by the decisions of some of the courts of France said statute law is held to extend to and operate upon all persons, whether citizens or aliens, upon the high seas, in vessels flying the French flag; and that under those statutes and decisions a right of action for the death of said deceased, enforceable in the District Court, arose and existed in favor of the libellant. Exceptions to the libel were filed, which were sustained by the District Court, and the libel was dismissed. The decree of the District Court was affirmed in the Court of Appeals.

It is not altogether clear upon the allegations of the libel what the character of the French law was under which the libellant claimed to have acquired his right of action. His claim, by reason of the territoriality of La Bourgogne, might be based on the strictly local or territorial law of France; or he may have based his right upon the jurisdiction which France exercises, or may, if she chooses, exercise, over her own citizens, wherever they may be; or it may be that the libel was intended to set forth a right of action under the general maritime law of France.

As the case went off, however, it is not material to determine the proper construction of the libel in this particular.

The second exception asserted that "no right of action exists and no action can be maintained in a court of admiralty of the United States to recover damages for death by negligence occurring upon the high seas."

The third exception advances the proposition that "the general maritime law as interpreted and enforced by the courts of the United States" alone governs the case.

It is obvious that these exceptions could not be sustained and the libel dismissed unless it could be said, as a matter of law, however the libel might be construed, that the right of action could not be enforced in a court of admiralty of the United States.

Accordingly, neither the District Court nor the Circuit Court of Appeals undertook to construe the libel. The District Court simply assumed that it set out a right of action under the general maritime law of France, and held that such a right could not under the circumstances be enforced in an American court of admiralty.

The Court of Appeals considered each possible aspect of the

case. It took up first the question as to what would be the rights of the libellant if they depended on the strictly local or territorial law of France. In such case, of course, it would, as the court correctly declared, be necessary for the libellant to show that the cause of action arose within the French territorial jurisdiction. The libellant contended that the cause of action must be taken to have arisen within French territorial jurisdiction and to have been governed by the French territorial law, since the ship must be regarded as a floating portion of the territory of France.

Assuming this to be true, in the case before the court the gist of the action was, on elementary principles, the death, and the cause of action arose where the death took place. This being so, it would not seem an extreme step to take to hold that, if the negligent act caused the loss of the ship and death by drowning, the French territorial law should still govern, although, as was the case here, it were impossible to show whether the deceased were drowned in his bunk, or went down with the ship, or leaped into the sea and came to his end a few yards away. The court, however, declined to take this view. Bunn, J., after showing that the cause of action arose where the death took place, said: [1]

"To make the local law of France, therefore, of any possible application, it should appear by clear averment that the drowning took place upon the steamship. The libel nowhere states that the deceased came to his death while upon the Bourgogne. The averments are merely that he lost his life by drowning as a result of a collision and sinking of the vessel. The plain implication, therefore, is that he was drowned upon the high seas, apart from the vessel. At least, there is nothing to show the contrary. The locus of the tort, therefore . . . must be considered as being upon the high seas rather than upon French territory."

This line of argument would seem to be fairly open to the charge of excessive refinement; and the contrary was taken for granted in Regina *v.* Keyn.[2]

The court, however, did not base its decision on this ground. It held, not that the libel properly construed showed only a right given by French territorial law and therefore not enforceable for the reasons above quoted, but that if the libel was to be so construed there could be no recovery, and then proceeded to consider what would be the result if the libel correctly interpreted showed that the right given by the French law rested on some other basis, as,

[1] P. 656.

[2] 2 Ex. D. 63, 235.

for instance, the undoubted right of France to make laws which would bind its own citizens abroad, if they should ever return to be adjudged in the courts of their own country.[1]

By virtue of this power over its own citizens abroad, France had the right and authority to impose upon them the liability to pay damages for death caused by their wrongful or negligent acts on the high seas, to confer a right to recover those damages on the personal representative of the deceased, and to make that right enforceable in the French courts. Unquestionably, if the French statutes and decisions referred to in the libel rested on this principle, they conferred a right upon the libellant which he could have enforced, if the suit had been brought in France. Should an admiralty court of the United States enforce that right? The Circuit Court of Appeals said that the right of a nation to control its citizens abroad was not a right that would always be respected by the courts of other countries, and held that the libellant could not recover on this principle.

A very interesting question is here presented, and one on which there is little, if any, direct authority. Suppose the transaction had taken place within the territorial waters of a state of the United States where there was no action for death. As will be shown later, by the great weight of authority in the United States, a right of action duly acquired under foreign law will be enforced, though the transaction giving rise to the right would not give rise to a similar right in the country of the forum.

The fact, therefore, that there is no action by the law of the forum ought not to be of any more consequence than where the transaction giving rise to the right of action occurs on foreign territory. Of course, if the act for which the foreign law imposed a liability on its citizens were one which the law of the forum directly authorized or sanctioned, its courts could hardly be expected to hold that any one, even a foreigner, would be under any liability for doing what the law of the place where the act was done authorized and empowered him to do.

But the law of no state in the United States authorizes or empowers any one, citizen or foreigner, wrongfully to cause death. In fact in this case, if the libellant's intestate had escaped with injuries, the defendant would have been liable in damages. It would seem, in the case supposed, that an American court should not

[1] Story, Conf. of Laws, 8 ed., §§ 21, 22; The Zollverein, Swab. 96, 98; Reg. *v.* Keyn, 2 Ex. D. 63.

refuse, at any rate in favor of its own citizens, to enforce a right which would by that enforcement become a valuable right, which the law of France by virtue of its powers over its own citizens was competent to create, and which was not in conflict with the policy of, or any right created by, the law of the state of the forum, merely for the sake of preventing the French law from affecting, even indirectly, transactions occurring within the United States.

If this is sound, all the more should such a right be enforced where the transaction takes place on the high seas, where France has jurisdiction as fully as the United States.[1]

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[1] The Scotland, 105 U. S. 24; U. S. *v.* Rodgers, 150 U. S. 249, 272; The Brantford City, 29 Fed. 373, 383. The point was taken in The Mary Moxham, L. R. 1 P. D. 107. An English ship negligently injured a pier in a port in Spain. By the law of England the owners of the vessel would be liable for the negligence of the master and crew, if the negligent acts occurred in England. Under the law of Spain, there was no such liability on the part of the owners. The court gave judgment for the defendants.

If the defendants were liable at all, it was because the acts of the master and crew, on familiar principles of agency, were the acts of the owners. Those acts took place in Spain, and the cause of action arose there. If it be assumed that England, by virtue of her jurisdiction over her citizens wherever they might be, could and did give a right of action enforceable in the English courts for an act done in Spain, then it might be urged that the Spanish courts could and would enforce that right of action. Such being the case, the plaintiff should have had judgment. This, if the argument is understood, is precisely the position taken by Benjamin, counsel for plaintiff. The court, apparently not stopping to consider whether on the basis suggested an action would lie under the English law, if the Spanish law presented no difficulties, met him with the proposition that an action would not lie in England for a wrongful act committed abroad, unless the act were wrongful by the law of the place where it was committed as well as by the law of England, and that the act was not wrongful by the law of Spain. If the court meant by this that it must appear that an action would lie in both jurisdictions, it might perhaps be answered that according to the argument the English acquired right would be enforced in Spain and so the requirement be fulfilled. If the court meant that it must appear that an action would lie under the English law and under the Spanish law irrespective of that branch of it which dealt with the enforcement of foreign acquired rights, then the proposition announced by the court would, if sound, prevent recovery in England. As a matter of fact, however, both court and counsel considered the question as limited by the precise terms used, and Benjamin proceeded to argue that the act was wrongful under Spanish law because admittedly an action lay in Spain against the master and crew.

To this the court answered that the question as to who, if any one, was liable for a given act was in no sense a question of remedy or procedure, but one of substantive law. The decision was right, but the true reason for it was not clearly brought out. In fact counsel and court were somewhat at cross-purposes. Benjamin was apparently seeking the enforcement of a right given by the English law by virtue of its jurisdiction over British subjects everywhere. The court seemed to have assumed that the right sought to be enforced was acquired, if at all, under the laws of Spain. A sufficient answer to Benjamin's argument would have been that the law-making power of England, while undoubtedly possessing power to create rights of action against Englishmen for torts committed abroad, had not chosen to exercise that power. Setting

It is open, however, to the courts of any country, where the matter has not been decided to the contrary, to hold that a right acquired under the law of a foreign nation and based solely on its jurisdiction over its own citizens abroad will not be enforced where the question arises in respect of a transaction taking place outside the jurisdiction of that nation. The decision, therefore, of the Court of Appeals in the present case is not, perhaps, so far as this question is concerned open to serious criticism on strict legal grounds, whatever may be thought of the wisdom of such a rule on considerations of policy.

Having decided that there could be no recovery by the libellant if he based his right either on the French local law or on the jurisdiction of the French government over its own citizens everywhere, the court came finally to the question as to what the result would be if the libellant were given a right of action by the general maritime law of France, and held that such a right could not be enforced by an admiralty court of the United States.

It is the object of this article to question the accuracy of this decision, and to show that, where a right of action for death upon the high seas is given by the general maritime law of a foreign state, it should certainly be enforced, under proper conditions, by admiralty courts of the United States in favor of citizens of the United States, and should on principle also be enforced even as against citizens of the United States.

The doctrine upon which the enforcement of such rights rests is the familiar one set forth in Dennick *v.* Central R. Co.,[1] in which case Mr. Justice Miller, delivering the opinion of the court, said :

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that consideration aside, the court could properly have said that the English courts would not in any event enforce such a right where it conflicted with an equally valid right created by a foreign country acting within its strict territorial jurisdiction. The Spanish law had a right to provide and did provide that no employer should be liable for the negligent acts of his servants committed on Spanish territory. This immunity conferred on the defendant by the Spanish law was a right of as high a character as the right acquired by the plaintiffs under the English law, and as the transaction occurred on Spanish territory the defendant properly prevailed. The significant part of the case. so far as this discussion is concerned, is that counsel of Benjamin's eminence should advance the proposition that the Spanish courts would enforce rights acquired under English law by virtue of England's jurisdiction over her own subjects in respect of a transaction occurring on Spanish territory, if the act were wrongful by Spanish law. Had the act, in truth, been wrongful by Spanish law, although not actionable, irrespective of considerations of comity, and no right of immunity had been conferred on the defendant, the situation would have been on all fours with the case under discussion and Benjamin's position would have been sound.

[1] 103 U. S. 11.

"It is, indeed, a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

In Hilton *v.* Guyot[1] Chief Justice Fuller in his dissenting opinion,[2] concurred in by Justices Harlan, Brewer, and Jackson, said:[3]

"The rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails today by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right."

The contention has been made that a right of action arising under foreign law should not be enforced if there would be none by the law of the forum in case the transaction giving rise to the right took place within the jurisdiction of the forum. In the federal courts of the United States at least, such is not the law, and a long line of federal decisions, to only a few of which it is necessary to refer, has firmly established for those courts the general doctrine of enforcing rights accruing under foreign law, whether the law of the forum gives a similar right or not.[4]

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[1] 159 U. S. 113.

[2] While these remarks were made in a dissenting opinion, the dissent proceeded on a distinct ground, and there is nothing to indicate that on this point all the judges were not in accord.

[3] P. 233.

[4] Texas & Pac. R. Co. *v.* Cox, 145 U. S. 593; Huntington *v.* Attrill, 146 U. S. 657; Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190; Stewart *v.* B. & O. R. Co., 168 U. S. 445; Barrow S. S. Co. *v.* Kane, 170 U. S. 100; Nonce *v.* R. & D. R. Co., 33 Fed. 429; McCarty *v.* N. Y., etc., R. Co., 62 Fed. 437; Theroux *v.* Northern Pac. R. Co., 64 Fed. 84; Bigelow *v.* Nickerson, 70 Fed. 113; Boston & M. R. Co. *v.* McDuffey, 79 Fed. 934;

The same rule is followed in the admiralty courts of the United States, which have repeatedly enforced rights accruing under the laws of the different states and of foreign countries where the subject matter of the controversy has been maritime in its nature.[1]

It is not, of course, every right acquired under foreign law that will be enforced. It must first appear that certain requirements prescribed by established principles as to the origin and character of the right are fulfilled.

The court of the forum must have jurisdiction over the *res* if the right is *jus in re* and over the person of the defendant if the right is *in personam.*

The cause of action must be transitory in its nature.

The court must have jurisdiction of the subject matter of the controversy.

The right must have been duly acquired; in other words, the law under which it arose must have been competent, upon recognized legal principles, to create it.

The enforcement of the right must appear to be not contrary to the established public policy of the country of the forum.

Finally, if the cause of action arose in a locality subject to two or more jurisdictions, it should appear that a right arising under the laws of one of such jurisdictions does not conflict with rights of equal value created by the law of another.

No question was, or could be made that the District Court in the present case had jurisdiction over the person of the defendant, or that the action was transitory in its nature. It is equally clear that the District Court and the Circuit Court of Appeals, being admiralty courts of the United States, had jurisdiction of the cause of action in consequence of its maritime nature as a tort upon the high seas.[2]

Davidow *v.* Pa. R. Co., 85 Fed. 943; Law *v.* Western Ry., 91 Fed. 817; Van Doren *v.* Pa. R. Co., 93 Fed. 260; Erickson *v.* Pacific Coast S. S. Co., 96 Fed. 80.

[1] *Ex parte* McNiel, 13 Wall. (U. S.) 236; Steamboat Company *v.* Chace, 16 *ibid.* 522; The Lottawanna, 21 *ibid.* 558; The Corsair, 145 U. S. 335; The Glide, 167 U. S. 606; Holmes *v.* O. & C. Ry Co., 5 Fed. 75; *In re* Long Island, etc., Transportation Co., 5 Fed. 599, 608; Garland, 5 Fed. 924; The E. B. Ward, Jr., 16 Fed. 255; s. c. 17 Fed. 456; The Cephalonia, 29 Fed. 332; The James Berwind, 44 Fed. 693; s. c. 49 Fed. 956; The Oregon, 45 Fed. 62; The St. Nicholas, 49 Fed. 671; The H. E. Willard, 52 Fed. 387; The City of Norwalk, 55 Fed. 98; Bigelow *v.* Nickerson, 70 Fed. 113; Robinson *v.* Detroit, etc., Navigation Co., 73 Fed. 883; The Jane Grey, 95 Fed. 693; The Onoko, 107 Fed. 984, 986.

[2] Gordon, Petitioner, 104 U. S. 515; The A. W. Thompson, 39 Fed. 115; The City of Norwalk, 55 Fed. 98, 108; Stern *v.* La Compagnie Générale Transatlantique, 110 Fed. 996, 998.

A more serious question is whether the general maritime law of France was competent to confer on the libellant the right of action he sought to enforce.

The proposition here involved is thus stated by Mr. Dicey:[1]

"Any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English courts, and no right which has not been duly acquired is enforced or, in general, recognized by English courts."

After explaining the meaning of the words "right" and "acquired" as used by him, the learned author sets forth the significance of the term "duly"; he says:[2]

"The mere possession of a right by A under the law of a foreign country, *e. g.*, Italy, is not of itself the foundation for its enforcement, or even of its recognition, by English tribunals. The foundation is its due acquisition under the law of Italy. . . . What, then, is the test of due acquisition? . . . The right conferred by the Italian sovereign and acquired by A may lack due acquisition because the right is one which, in the opinion of the English courts, the King of Italy, acting either as legislator or judge, has conferred without possessing proper authority to confer it. The Italian sovereign has in the supposed case acted, in the opinion of English courts, *ultra vires*. . . . A sovereign's authority, in the eyes of other sovereigns and the courts that represent them, is, speaking very generally, coincident with, and limited by, his power."

In determining whether the law of a foreign state is, according to this rule, competent to create a given right, no question can arise as to the duty of the courts of that state to enforce any right given by the law thereof. If the law of France gives a right of action even as against foreigners for death upon the high seas, it is the duty of the French courts to enforce that right.[3]

Neither will any question necessarily arise so long as the right is enforced in respect of transactions occurring within the territorial jurisdiction of the country in question, or, if outside thereof, against its own citizens only.

The question of due acquisition is most frequently and most sharply raised when the foreign acquired right is sought to be enforced against a citizen of the country of the forum. It is clear

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[1] Dicey, Confl. of Laws, 22.

[2] P. 26.

[3] Reg. *v.* Keyn, 2 Ex. D. 63, 160, 220; Seward *v.* Vera Cruz, 10 App. Cas. 59 (*per* Lord Blackburn).

that such a right must be regarded as duly acquired, that, in other words, the law under which the right arises must be held competent to create it, if a judgment enforcing such right in the country in which it arises will be treated as valid by the courts of other nations, especially the nation against a citizen of which the judgment is given.

So here the French maritime law was competent to create the right set forth in the libel, if, on established legal principles, the courts of other nations, particularly the United States, would recognize as valid the decree of a French court enforcing such a right against an American citizen.

It should not be lost sight of, in a discussion of this question, that reference is had to strict legal rights, and that when it is said that a right acquired under foreign law will or will not be enforced, the term law is to be understood in the sense of the express command of the law-making power of a sovereign state. As was said by Judge Grosscup for the Circuit Court of the United States for the Northern District of Illinois:[1]

"In the sense under review, it is a rule of civil conduct prescribed by the supreme power in the state. Mere definitions of right and wrong are not necessarily law. They may be so manifestly just that they ought to control civil conduct, but the citizen is under no legal obligation to obey them unless they are the express command of the supreme power in the state. A rule of civil conduct, to have the force of law, must emanate from some power that is supreme in the field to which the rule belongs. When we would know what the law is, therefore, we must inquire always from what power it proceeds, and the right of that power to prescribe it."

In this sense there is no such thing as a general maritime law apart from the law of any particular state. The general maritime law as understood and administered in any state is a part of the law thereof. It is a rule of conduct prescribed by the supreme power in that state.

Mr. Justice Bradley, delivering the opinion of the court in the Lottawanna,[2] said:

"But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war,

[1] Swift *v.* Phila., etc., R. Co., 64 Fed. 59, 61. See also Reg. *v.* Keyn, 2 Ex. D. 63, 151.

[2] 21 Wall. (U. S.) 558, 572.

which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this Union also presents an analogous case. It is the basis of all the state laws; but it is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have."

And again, —

"Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it."[1]

In The Manhasset[2] Judge Hughes, speaking of the maritime law, said:[3]

"It is not to be supposed, however, that this law has any force in any particular jurisdiction contrary to the will of that sovereign power. Only so far as it is adopted by the legislation and enforced by the judicial tribunals of each sovereignty, has it force in each jurisdiction."

In Lloyd *v.* Guibert[4] Mr. Justice Willes, in dealing with the plaintiff's contention that the case should be governed by the general maritime law, said:[5]

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[1] Mr. Justice Bradley repeated these declarations in The Scotland, 105 U. S. 24, saying: "But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in The Lottawanna, 21 Wall. 558, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country." See also The Gaetano & Maria, L. R. 7 P. D. 137, 143.

[2] 18 Fed. 918.

[3] P. 921.

[4] L. R. 1 Q. B. 115.

[5] P. 123. See also Chartered Mercantile Bank of India *v.* Netherlands, etc., Co., 10 Q. B. D. 521; Liverpool & Great Western Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 444; Butler *v.* Boston Steamship Co., 130 U. S. 527, 556; *In re* Garnett, 141 U. S. 1, 13; Ralli *v.* Troop, 157 U. S. 386, 407; The John G. Stevens. 170 U. S. 113, 126, 127; *In re* Long Island, etc., Transportation Co., 5 Fed. 599, 614; The Katie, 40 Fed. 480, 494; Swift *v.* Phila. & R. R. Co., 64 Fed. 59, 68.

"We can understand this term in the sense of the general maritime law as administered in the English courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which, by the hypothesis, does not recognize its alleged rule, we were not informed what may be its authority, its limits, or its sanction. . . . It would be difficult to maintain that there is, as to such questions as the present, depending in a great measure upon national policy and economy, any general in the sense of universal law binding at sea, any more than upon land, nations which either have not assented or have withdrawn their assent thereto."

It follows that, when an admiralty court of any nation entertains a suit relating to transactions occurring on the high seas, the right administered or enforced will be a right given by that branch of the law of the nation which deals with maritime matters. If, for instance, a libel is instituted in a British admiralty court to recover damages caused by a collision on the high seas between a British and an American vessel, and a recovery is had, it will be based on a right conferred on the libellant, not by any independent system of law called the general admiralty law, for there is no such thing, but by that part of the law of England that concerns itself with such matters.

The right which an admiralty court is called upon to enforce is not necessarily a right acquired under the law of the nation in which the court sits; it may arise under the law of some foreign state; but it is invariably true that the right enforced is created by the fiat of some state or nation. In any litigated case there always is or may be a question as to what the law governing the controversy is. In suits in admiralty courts where such a question arises, resort is properly had to the mass of ordinances, decisions, and treatises of all the civilized states to ascertain what the consensus of opinion is on the point under discussion as bearing on the real issue, that is, what the maritime law of the forum may be on the point. This mass of ordinances, decisions, and treatises is for convenience appropriately enough termed "the law of the sea," or the "general maritime law." But as a system creating legal rights and imposing legal duties there is no such thing as a general maritime law, except as it forms a part of the judicial code of a particular nation.

By what right, then, do the maritime states adjudicate upon con-

troversies arising out of transactions upon the high seas in which foreigners are involved? To put the question in another way, why is it that a decree of a British admiralty court casting an American ship in damages by reason of a collision on the high seas, which are not within British jurisdiction, will be recognized as valid in the United States? The answer to both questions is the same, and is that the various civilized states have agreed to allow each other to take full cognizance of controversies upon the high seas. It is not enough to say that as the court has jurisdiction over the *res* its decree *in rem* will be valid everywhere. The court must also, in cases where the cause of action depends upon the locality of the transaction, have jurisdiction over the place where the transaction occurred. If that place is the high seas, the courts of no nation can have jurisdiction, as against the citizens of other nations, in respect to transactions occurring thereon, except by consent. The foundation, therefore, of the admiralty jurisdiction is the common consent of the different maritime states.

"As maritime commerce came to be extended, and international commerce and intercourse became more frequent, the sea was considered the common highway of nations, where, for the purposes of business, all nations must be equal in right, and the common convenience, as well as the common right, rendered necessary and ultimately established general rules, as the Law of the Sea, to which all submitted as to a sort of maritime law of nations, and the courts of each nation enforced it." [1]

As said by Mr. Justice Strong, delivering the opinion of the court in The Scotia,[2]

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is in force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world."

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[1] Benedict, Adm. Pr., 3 ed., 2.

[2] 14 Wall. (U. S.) 170, 187. This language was quoted with approval in The Paquete Habana, 175 U. S. 677, 711. See also *In re* Long Island, etc., Transportation Co., 5 Fed. 599, 622.

In Thomassen *v.* Whitwell [1] it was said by Judge Benedict:

"There is also a general maritime law in force on the sea which is part of the law of nations, and consists of certain rules applicable to affairs of the sea, which have been so often acted upon, and by so many different nations, that they are deemed to have been assented to by all, and according to which all persons going on the sea may justly be supposed to have agreed to be judged in respect to acts there done. This law courts of admiralty by the comity of nations are in a proper case authorized to administer."

In The Manhasset [2] Judge Hughes said: [3]

"The maritime law . . . is a system of usages and principles which has been adopted by the general consent of commercial nations. It is not to be found in any distinct code or body of legislation, but is so thoroughly exemplified in treatises and recorded adjudications as to have lost the character of an unwritten law. It has its authority and sanction in the consent of all nations, whose courts enforce its principles. After its claim to be founded on principles of natural justice, its highest value consists in its world-wide uniformity and acceptance."

The significance of this common agreement is that while, as a general proposition, it is true that the law of no state can have any efficacy beyond the territories thereof, and that the high seas, being under the territorial jurisdiction of no nation, are subject to the laws of no nation, nevertheless the maritime states are content to recognize the right of the maritime courts of each of them to adjudicate upon transactions occurring on the high seas and are content to abide by the result of such adjudications.

For example, a British ship collides with a Dutch ship on the high seas and is libelled in a French admiralty court. A decree of the French court condemning the British ship is valid and conclusive not only in Great Britain but all over the world.[4] Why? Because all the maritime states have agreed that France may adjudicate upon transactions taking place on the high seas where her forum is sought, and have further agreed to be bound by the result.

The offending ship, as is common knowledge, might be libelled in the proper admiralty court of any nation where jurisdiction could be obtained, because at the moment of the collision a right of property in the ship arose under the law of that nation which

[1] 9 Ben. U. S. 403.
[2] 18 Fed. 918.
[3] P. 920.
[4] Croudson *v.* Leonard, 4 Cranch (U. S.) 434; Hilton *v.* Guyot, 159 U. S. 113, 167.

its court will enforce, and a decree establishing which will be valid all over the world by reason of the fact that all other nations have consented that such right might be created and that such jurisdiction should be exercised.

In short, by reason of this common consent of the nations, a state may, by that branch of its general law dealing with maritime matters, give a right of action in consequence of transactions occurring outside of its territorial jurisdiction and upon the high seas; and a decree of an admiralty court of such nation enforcing such right will be as universally binding and valid as though rendered in a cause arising out of transactions occurring within its territorial jurisdiction, although one or more or all of the parties be foreigners, and whether the proceeding be instituted by or against foreigners, and whether the result be in their favor or against them.

If, therefore, that branch of the law of France that relates to transactions upon the high seas gave a right of action for death occurring thereon, and a French admiralty court enforced that right in favor of a French citizen against a foreigner, it would seem unmistakably to follow that the decree of the French court would everywhere be regarded as being just as valid as a decree in a suit concerning events taking place within French territorial jurisdiction.

So here, if the libellant had obtained a decree in a French court, it would be regarded as binding in the United States if *in rem*, and just as effectual as any other decree of a French court if *in personam*.

It might conceivably be urged that there is a limit to the jurisdiction which any single nation, by reason of the consent of the other nations, may exercise; that in event of any wide departure from received doctrines it must be presumed that there has been no such consent, and that a decree of a foreign admiralty court proceeding on any such basis should not be treated as valid; that a right of action for death is such a departure, and that an admiralty court of the United States should refuse to recognize the validity of a decree of a French admiralty court awarding damages against a citizen of the United States for causing death on the high seas; that, in short, the French law was incompetent to confer such a right at any rate against any one but a French citizen.

It was some such consideration as this that prompted the Court of Appeals in the Rundell case to declare that "it is not within the

jurisdiction of the legislative powers of any one nation to make the maritime law for the whole world, so far as the courts of other countries are concerned."

Whether, by virtue of the general consent of the nations, as above described, any one nation would be authorized as against the others so to modify its maritime law as to make that maritime which they should unite in declaring to be not maritime, it is not necessary to determine, inasmuch as the cause of action in question is clearly maritime.

The stress laid by the Court of Appeals on the legislative character of the law which it declared no one nation had power to make, raises the preliminary inquiry as to whether a statutory modification of the maritime law would stand on any different footing from a modification by judicial decision.

There can be no ground for laying down the arbitrary proposition that the nations have consented to each other's adjudicating as to transactions on the high seas in accordance with the law of the sea as declared by the courts of the forum and not as declared by its legislature. Either the admiralty jurisdiction is based on a consent which involves such changes within admitted maritime limits as each nation finds necessary or expedient, or it is based on a consent which involves only the maritime law as each nation conceives it, in its pure form, to be. In the latter case a change by judicial decision must be as obnoxious as one by legislative enactment. For example, in The Genesee Chief[1] the Supreme Court of the United States declared that the admiralty jurisdiction embraced the Great Lakes, and that therefore the Act of Congress of February 26, 1845,[2] which purported to extend the admiralty jurisdiction to the Great Lakes was, so far as that was concerned, void and of no effect. What difference could it make to Great Britain, if she were inclined to object to the extension of the *in rem* process and maritime liens to her vessels in a place that had never before been subject to the admiralty jurisdiction, whether that extension resulted from the statute or the decision? There is no basis for any distinction.

Assuming, therefore, that a nation cannot draw within its maritime jurisdiction that which is admittedly not maritime, and that, if any change at all may be made it may be as well by statute as by judicial decision, is there any line beyond which a single state

[1] 12 How. (U. S.) 443.

[2] 5 Stat. at L. 726.

cannot go in modifying its maritime law, where other nations are involved?

It is very clear, to begin with, that vital changes in the general maritime law have been made by the different maritime states and have been generally acquiesced in.

Take, for instance, the subject of limitation of liability. Here is a matter which the Supreme Court of the United States has repeatedly declared to be peculiarly a subject of admiralty jurisdiction.[1]

Limitation of liability has been a well-established principle of the general maritime law of Europe since medieval times. Yet England refused to recognize any such principle until 1734, and then only to a limited extent. Not until 1862 did the principle receive its fullest measure of recognition there, and today the rule is substantially less favorable to shipowners than in almost any other important maritime jurisdiction. While the states of Massachusetts and Maine enacted limited liability statutes in 1818 and 1820, it was not until 1851 that Congress took any action on the matter.[2]

The rejection by England and the United States of the doctrine of limitation of liability was a modification of the maritime law as generally received.[3] It was moreover a modification of the most vital importance. The fiat of the English and American courts at one stroke took away from shipowners a protection which confined their liability to the value of the ship and freight pending, and which in many cases would amount to a complete defense, and substituted in the place thereof an infinite liability.

Yet it was never heard that a decree of an English or American admiralty court before the days of limited liability in those countries holding foreign shipowners to an unlimited liability failed of recognition in foreign countries as a valid decree on the ground suggested.

The extension of the American admiralty jurisdiction to the

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[1] The Scotland, 105 U. S. 24; Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578; Butler *v.* Boston S. S. Co., 130 U. S. 527, 549; *In re* Garnett, 141 U. S. 1; 13; Oregon Railroad & Navigation Co. *v.* Balfour, 179 U. S. 55, 56.

[2] Norwich & N. Y. Transportation Co. *v.* Wright, 13 Wall. (U. S.) 104; The Scotland, 105 U. S. 24; Butler *v.* Boston S. S. Co., 130 U. S. 527, 556; *In re* Garnett, 141 U. S. 1, 14; The Rebecca, 1 Ware (U. S.) 188; The Epsilon, 6 Ben. (U. S.) 378; Thomassen *v.* Whitwell, 9 Ben. (U. S.) 458; *In re* Long Island, etc., Transportation Co., 5 Fed. 599; The Katie, 40 Fed. 480, 494; *In re* Whitelaw, 71 Fed. 733, 734.

[3] Butler *v.* Boston S. S. Co., 130 U. S. 527, 556; *In re* Garnett, 141 U. S. 1, 14; The Katie, 40 Fed. 480, 494.

Great Lakes,[1] already referred to, also involved a vital change by which foreign ships might be subjected to the peculiar admiralty process in a large field where the admiralty was never supposed to have any jurisdiction whatever. There is no evidence that England has ever refused to recognize a decree of an American admiralty court pronounced in pursuance of this extension of the admiralty jurisdiction of the United States.

Another striking example is presented by the Harter Act.[2]

The Act applies to foreign as well as domestic vessels.[3] It is narrower than the limited liability acts in applying only to the relations between ship and cargo,[4] and it is broader in extending a complete, in place of a partial, immunity.

By the general maritime law of Great Britain a stipulation relieving a carrier from responsibility for the negligence of his servants is valid.[5] The Harter Act declares such stipulations absolutely invalid, thereby following the decisions of the American courts, which refused to enforce such contracts even when they contained a clause providing that the English law should govern.[6]

If, therefore, an American citizen shipped goods by a British ship from a British port to New York under a bill of lading which stipulated that the shipowner should not be responsible for the negligence of the master or crew and that the British law should govern, Sections 1 and 2 of the Harter Act would, if the ship were libelled by the cargo-owner in an American court, deprive the shipowner of the benefit of his stipulation, whether or not he obtained the benefit of the exemption of Section 3. Conversely, if a citizen of Great Britain shipped goods in an American bottom from an American port to Liverpool under a bill of lading not containing any exempting clause, but providing that the English law should govern, the cargo-owner might, under Section 3 of the Act, be deprived of all redress for the loss of his goods if his suit were brought in an American court.

Yet there can hardly be a question that the judgment of the

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[1] The Genesee Chief, 12 How. (U. S.) 443; The Hine, 4 Wall. (U. S.) 555; The Glide, 167 U. S. 606, 614; Water Power Co. *v.* Water Commissioners, 168 U. S. 349, 361.

[2] Act of Feb. 13, 1893, c. 105, 27 Stat. at L. 445.

[3] The Carib Prince, 170 U. S. 655; The Silvia, 171 U. S. 462; The Chattahoochee, 173 U. S. 540; The Etona, 64 Fed. 880.

[4] The Delaware, 161 U. S. 459.

[5] Carver, Carriage by Sea, 3 ed., 117, § 101.

[6] *Ibid.* 122, § 103 a.

American courts would in all such cases be recognized as valid in Great Britain.

Further, it is at least questionable how far, prior to the decision in the case of The Bold Buccleugh[1] in the year 1851, the maritime law of England gave a lien for collision damage. At one period, at any rate, there was, and perhaps at the present time there is, no lien under the English law in the absence of a personal remedy against the owners. Even in the modern decisions most favorable to the lien it is limited to cases where the collision is caused by the fault of the owner or those who may fairly be said to represent him.[2] Contrast this doctrine with the broad American rule that gives a lien for collision damage in all cases whatsoever.[3]

It might well happen that a British ship, libelled in an American admiralty court in a collision case, would be held, under circumstances which would not give rise to a lien according to the maritime law of England. It is not probable, however, that Great Britain would refuse to recognize the validity of such a decree because it involved a modification of the maritime law to which she had not consented.

It thus appears that the different nations have not hesitated to make important changes, both by statutes and by judicial decisions, in the maritime law; that these changes have for the most part been made by each state separately and alone; and that the other states have not failed to acquiesce in adjudications rendered in accordance with these changes, even although their own citizens or vessels were affected.

Assume, however, that there is a line beyond which the nations cannot be presumed to have gone in consenting to each other's jurisdiction as to transactions on the high seas; where is that line to be drawn? Shall we say that in giving this consent the nations had reference to the general maritime law as it was understood at a given period, and that all subsequent modifications or amendments must be disregarded? If so, what is that period of time and who is to determine it? Or is the general maritime law as commonly accepted without reference to any particular period of time

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[1] 7 Moo. P. C. 267.

[2] Abbott, Merchant Ships and Seamen, 14 ed., 1011; Marsden, Collision, 5 ed., 72, 80 *et seq.*; Williams & Bruce, Adm. Pr., 3 ed., 82; The City of Norwalk, 55 Fed. 98, 111.

[3] The Palmyra, 12 Wheat. (U. S.) 1, 14; Brig Malek Adhel, 2 How. (U. S.) 210, 234; Thorp *v.* Hammond, 12 Wall. (U. S.) 408; The Clarita and the Clara, 23 *ibid.* 1; Workman *v.* The Mayor, 179 U. S. 552; The Barnstable, 181 U. S. 464, 467.

the important feature? In any view, who is to determine what the general maritime law is at any period of time? It is obvious that there would be as many separate answers to these questions as there are maritime nations. Those answers, moreover, would be not unlikely to be conflicting. It is quite certain that each nation would determine for itself what the general maritime law was, and whether or not a particular statute or decision of a foreign tribunal was a departure therefrom. The result could only be confusion.

Even supposing it were possible to arrive at some agreement as to what the general maritime law was at any particular period, still it is not to be presumed unless cogent reasons compel, that the maritime states deliberately bound themselves to a hard and fast system of law unchanging and unchangeable however imperatively the shifting conditions of society might demand modification.

As Mr. Justice Holmes puts it in The Blackheath,[1] "It would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England or France."

The suggestion, though made in a different connection, is wholly pertinent to the present discussion. It is impossible to believe that the nations could have contemplated that the system of law which they had agreed might be administered by each other in relation to maritime affairs should forever remain unalterable. They must have contemplated the possibility of modification. Yet, except in the extremely improbable event of an international agreement, no modification could be effected otherwise than by the maritime states separately.

If the admiralty jurisdiction respecting transactions on the high seas rests on the consent of the different maritime states, as it most assuredly does, those states by force of such consent have the right to adjudicate upon such transactions by the principles of the general maritime law as understood and administered in any state assuming jurisdiction, and as that state in the exercise of a reasonable discretion may, within the limits above referred to, choose to alter or modify it by statute or decision, having due regard to the fact that "the convenience of the commercial world, bound together, as it is, by material relations of trade and intercourse, demands that, in all essential things wherein those relations bring them [the

[1] 195 U. S. 361, 364. See also The Lottawanna, 21 Wall. (U. S.) 558; Butler *v.* Boston S. S. Co., 130 U. S. 527, 555; *In re* Garnett, 141 U. S. 1, 13; *In re* Long Island, etc., Transportation Co., 5 Fed. 599, 616; The Katie, 40 Fed. 480, 493.

nations] in contact, there should be a uniform law founded on natural reason and justice." [1]

The question is in effect covered, so far as the United States is concerned, by the declarations of the Supreme Court of the United States. In The Lottawanna[2] it was said by Mr. Justice Bradley:

"No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third.

"No nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local or municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries are not one and the same in every particular; but that, whilst there is a general correspondence between them arising from the fact that each adopts the essential principles and the great mass of the general maritime law as the basis of its system, there are varying shades of differences corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole."

And again,

"Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed." [3]

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[1] The Lottawanna, 21 Wall. (U. S.) 558.

[2] *Supra.*

[3] In The Scotland it was said by the same learned judge: "English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which, in generality of terms, were similar to our own, did not apply to foreign ships. . . . We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this, that the British legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign states, or to make for them a law of the high sea; and that if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress."

The Court of Appeals relied on that part of the above passage which says that no nation has any right to prescribe regulations to bind the subjects of foreign states, or to make for them a law of the high sea. But the context shows that all the court meant to say was that no nation could prescribe regulations which would preclude

But, however this may be, the precise question in this connection is whether the consent of the United States that France should have the right to adjudicate in relation to transactions upon the high seas where citizens of the United States are involved includes the right to give, by statute or judicial decision, an action for death on the high seas, a judgment enforcing which in a French court against a citizen of the United States would be regarded as valid in this country.

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[*To be continued.*]

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other nations from operating in the same field. The court recognized the right of every nation to declare what it will accept and by its courts enforce as the law of the sea. If this means anything, it includes the proposition that if the courts of a nation, adjudicating in regard to transactions on the high seas involving foreigners, administer rules which, by reason of modifications of the maritime law enacted by the courts or legislature of the nation, differ from the maritime law as understood in the country of the foreign litigant, the result will nevertheless be acquiesced in by that foreign country, whether the foreigner invoked the jurisdiction or not. When the Supreme Court said that each nation might declare what it will accept and enforce as the law of the sea, it could certainly have meant nothing less than that the decision of a foreign tribunal enforcing its law against an American ship over which it had acquired jurisdiction should on recognized legal principles be acquiesced in by the United States. See also The Belgenland, 114 U. S. 355, 370; Butler *v.* Boston Steamship Co., 130 U. S. 527, 556; *In re* Garnett, 141 U. S. 1, 12; The Manhasset, 18 Fed. 918, 921; Workman *v.* New York City, 179 U. S. 552, 561; *In re* Long Island, etc., Transportation Co., 5 Fed. 599, The Katie, 40 Fed. 480, 493, 494.